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In the Supreme Court of the United States

CITY OF ALTOONA, PENNSYLVANIA,

Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

PETITION OF THE CITY OF ALTOONA, PENNSYLVANIA FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a municipal employer enjoined by a state court injunction—and precluded by the mandatory *stare decisis* effect of two recent state appellate court decisions—from disregarding the provisions of the applicable state civil service legislation in effecting a budgetary reduction-in-force of its firefighter employees, equitably should be subject to backpay liability when the controlling state civil service legislation is first held almost five years later to be in contravention of the Age Discrimination in Employment Act.

LIST OF PARTIES IN COURTS BELOW

The parties in the United States District Court for the Western District of Pennsylvania and the United States Court of Appeals for the Third Circuit were the Plaintiff Equal Employment Opportunity Commission, and Defendants City of Altoona, Pennsylvania, and Commonwealth of Pennsylvania.

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OTHER AUTHORITIES

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is reported at *Equal Employment Opportunity Commission v. The City of Altoona*, 723 F.2d 4 (3d Cir. 1983). The Opinion of the United States District Court for the Western District of Pennsylvania has not officially been reported.

JURISDICTION

Petitioner City of Altoona seeks review of the judgment of the December 13, 1983 United States Court of Appeals for the Third Circuit, which was entered on December 13, 1983. Jurisdiction of the United States Supreme Court to review this judgment by writ of certiorari is conferred by 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 4(f) of The Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 623(a):

(a) Employer practices:

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

Section 11 of Third Class Cities' Firemen's Civil Service Act of May 31, 1933, P.L. 1108, 53 P.S. §39871:

If for reasons of economy, or other reasons, it shall be deemed necessary by any city to reduce the number of paid members of any fire department, or the number of fire alarm operators or fire box inspec-

tors in the bureau of electricity, then such city shall follow the following procedure:

First. If there are any paid firemen, fire alarm operators or fire box inspectors eligible for retirement under the terms of any pension fund, then such reduction in numbers shall be made by retirement on pension of all the oldest in age and service.

Second. If the number of paid firemen, fire alarm operators and fire box inspectors eligible for retirement under the pension fund of said city, if any, is insufficient to effect the reduction in number of desired by said city, or if there is no eligible person for retirement, or if no pension fund exists in said city, then the reduction shall be effected by suspending the last man or men, including probationers, that have been appointed. Such removal shall be accomplished by suspending in numerical order, commencing with the last man appointed, all recent appointees until such reduction shall have been accomplished. Whenever such fire department or fire alarm operators or fire box inspectors in the bureau of electricity shall again be increased in numbers to the strength existing prior to such reduction of members, or if any vacancies occur, the employees suspended under the terms of this act shall be reinstated to their former class before any new appointees are appointed.

Section 4 of Third Class Cities' Firemen's Civil Service Act of May 31, 1933, P.L. 1108, as amended, 53 P.S. §39869 (Purdon Supp. 1983-1984):

All applicants for any position in the fire department and as fire alarm operators and fire box inspectors in the bureau of electricity shall undergo a physical examination, which shall be conducted under the

supervision of the physician member of the Civil Service Commission, or if there be none, then by a physician appointed by the Civil Service Commission. Said examiner shall certify that an applicant is free from any bodily or mental defects, deformity or diseases that might incapacitate him from the performance of the duties of the position desired before said applicant shall be permitted to take further examinations. No application will be received if the person applying is less than eighteen years of age or more than thirty-five years of age at the date of his application: Provided, however, that in event any applicant has formerly served in the fire department or as a fire alarm operator or fire box inspector in the bureau of electricity of the city to which he makes application for a period of more than six months, and no charges of misconduct or other misfeasance were made against such applicant within a period of two years next preceding the date of his application, and is a resident of the city, then such person shall be eligible for reinstatement, in the discretion of the Civil Service Commission, even though such applicant, providing his former term of service so justifies, may be reappointed to the fire department or as a fire alarm operator or fire box inspector in the bureau of electricity without examination, other than a physical examination. If such person is reinstated, he shall be lowest in rank in the department next above the probationers of the department.

STATEMENT OF THE CASE

The last several years have not been the best of times for the City of Altoona, Pennsylvania ("the City"). The former lifeblood of this community—the railroad industry—has long been in virtual despair. Caught in a relentless

wage and inflationary spiral, combined with erosion of its tax base and diminished resources, it was with considerable chagrin, but compelling necessity, that in late 1978 the City set out to tighten its fiscal belt.

On December 29, 1978, the City, by Resolution 5581 of Council, "for purposes of economy necessitated by lack of funds and appropriations [and] with regret" effected a reduction-in-force of its employed firefighters by abolishing eight firefighter employment positions. The eight most recently employed firefighters through their union counsel resisted the resolution with commencement of an equity action in the Court of Common Pleas of Blair County, Pennsylvania, seeking a prohibitory injunction preventing their discharge and a mandatory injunction requiring the City to adhere to the Third Class Cities' Firemen's Civil Service Act, 53 P.S. §39871 ("Civil Service Act").[1]

The Civil Service Act provided then, as it does today:

> If for reasons of economy, or other reasons, it shall be deemed necessary by any city to reduce the number of paid members of any fire department . . . then such city shall follow the following procedures: First. If there are any paid firemen . . . eligible for retirement under the terms of any pension fund, then such reduction in numbers shall be made by retirement on pension of all the oldest in age and service.

53 P.S. §39871. The City conceded in the Blair County action the provisions of the Civil Service Act, but advocated that the Civil Service Act was pre-empted by the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*

[1]None of the putative members of the Equal Employment Opportunity Commission's plaintiff class intervened in this action, as they clearly might have. Pa.R.C.P. 2326-2330. *Cf. County of Allegheny v. Commonwealth of Pennsylvania*, 71 Pa. Commw. 32, 453 A.2d 1085 (1983).

("ADEA"), pursuant to the Supremacy Clause of the United States Constitution:

> The Civil Service Act is indeed specific in its language, and if no other statutory provisions were involved, the claim for relief would appear evident. However, the City argues that the quoted Pennsylvania Statute is superseded by the Federal Age Discrimination in Employment Act of 1967.... In this connection, the Court was furnished with a copy of a letter from the acting administrator of the Employment Standards Administration of the U.S. Department of Labor dated April 2, 1975, which advises that the Federal legislation prohibits employers, including local governments, from discriminating against older workers. Specifically the letter sets forth that it is the Department's opinion that the Pennsylvania statute violates this Federal legislation. It was also called to the attention of the Court that the Pennsylvania Human Relations Act has been interpreted as rendering the cited Civil Service provision as inoperative because it violates the Human Relations Act.

Ehredt v. Bettwy, No. 78-3197, Slip. Op. at 3-4 (Blair County C.P., Dec. 29, 1978; Appendix 16a-17a). Recognizing that the City was confronted with "conflicting legislation relative to termination of employment" (Slip Op. 4, Appendix 17a), the Court denied the furloughed firefighters' request for a preliminary injunction but reserved its final decision pending a subsequent hearing. The eight firefighters with the least seniority were discharged by the City in order to effectuate the necessary economy measures.

Three months later the Court of Common Pleas of Blair County, by Order dated March 16, 1979, held that

the provisions of the ADEA did not supplant the mandatory provisions of the Civil Service Act. It ordered reinstatement of the eight firefighters with full back pay and benefits. (Appendix 19a-21a.)

The Blair County Court of Common Pleas Order of March 16, 1979, although imposing a severe financial burden upon the City and, in the process, frustrating its efforts at economy, was solidly based on very recent mandatory Pennsylvania appellate court authorities. (See discussion, *infra*, at p. 10). The City therefore submitted to the decree, reinstating and making backpay awards to the eight firefighters. By March 21, 1979 Resolution 99 of Council the necessary economy measures were effected by involuntarily retiring firefighters in punctilious accordance with the March 16, 1979 Order, Section 244.32 of the City of Altoona - Local 299 Firefighters Union Collective Bargaining Agreement, and the Civil Service Act.

Two years later, on March 18, 1981, the Equal Employment Opportunity Commission commenced this action on behalf of the putative class of involuntarily retired firefighters.[2] The Pennsylvania Human Relations Commission also commenced an administrative proceeding against the City, alleging that the City had discriminated on the basis of age in retiring firefighters in accordance with the Civil Service Act. This administrative proceeding was abated in accordance with the §14(a) of ADEA, 29 U.S.C. §633(a).

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[2]The jurisdictional statement contained in ¶1 of the Equal Employment Opportunity Commission's Complaint was: "Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 451, 1337, 1343 and 1345. This is an action authorized and instituted pursuant to Section 7(b), 29 U.S.C. 626(b), of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621, *et seq.* (hereinafter referred to as the "ADEA"), which incorporates by reference Section 16(c) and 17, 29 U.S.C. 216(c) and 217 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201, *et seq.*"

On May 27, 1982, the United States District Court for the Western District of Pennsylvania issued an order granting the Equal Employment Opportunity Commission's motion to add the Commonwealth of Pennsylvania as a party-defendant. Based on interrogatory answers and supporting affidavits, both the Equal Employment Opportunity Commission and the City moved for summary judgment.[3] The September 28, 1982 judgment order of Senior District Judge Dumbauld granted the City's Motion for Summary Judgment. (Appendix 11a-13a).

Briefing and argument of the Equal Employment Opportunity Commission's appeal to the United States Court of Appeals for the Third Circuit was stayed pending this Court's resolution, in *Equal Employment Opportunity Commission v. Wyoming*, ____ U.S. ____, 103 S.Ct. 1054 (1983), of the constitutionality of the ADEA as applied to the States. Ultimately the United States Court of Appeals reversed the District Court's decision and remanded with instructions to enter judgment in favor of the Equal Employment Opportunity Commission, including reinstatement of the firefighters with full backpay.

ARGUMENT

The Civil Service Act was signed into law by Pennsylvania Governor Pinchot during the Great Depression. Hardly a modest sense of history is required to appreciate that the paramount concern of the Pennsylvania General

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[3]The Attorney General of the Commonwealth of Pennsylvania, the highest legal official of the Commonwealth, joined in the City's motion. This position of the Commonwealth of Pennsylvania was, of course, diametrically different from the position of the Pennsylvania Human Relations Commission in its previously abated administrative proceeding against the City, and emphatically illustrates the quandary which confronted the City in its attempt to conform its employment practices to applicable laws.

Assembly was that no employee—young or old—should avoidably be furloughed without some source of income. The Civil Service Act was, and is, humanitarian in both purpose and impact; neither state nor federal courts have been oblivious to these underlying salutary legislative policies:

> Finally, it appears to us that the effect of Section 11 of the Act is to insure that as few firemen as necessary are left without a source of income where there is a reduction in force rather than to discriminate against the aged.

Schultz v. Piro, 40 Pa. Commw. 395, 399, 397 A.2d 484, 485-6 (1979). *Accord, Zinger v. Blanchette*, 549 F.2d 901, 905 (3rd Cir. 1977) (pre-1978 ADEA amendments case):

> There is, however, a clear, measurable difference between outright discharge and retirement, a distinction that cannot be overlooked in analyzing the Act. While discharge without compensation is obviously undesirable, retirement on an adequate pension is generally regarded with favor. (Footnote omitted.)

Thus, even in March of 1979, the City was justified in relying upon these precedents as embodied in the March 16, 1979 Order of the Blair County Court of Common Pleas. *Cf.*, ADEA, 29 U.S.C. §626(e) (reliance upon administrative regulation or interpretation); Civil Rights Act of 1964, §713(b), 42 U.S.C. §2000e-12 (non-liability for reliance upon written EEOC interpretation or opinion). Only a perverse legal system would protect citizens from claims when cloaked with the shroud of *ex parte* fiat of administrative bureaucrats, yet leave them defenseless and exposed to substantial liability and obloquy for having adhered to the most fundamental of our common law precepts: *stare decisis.*

It is appropriate to emphasize that more than five years ago, the City advocated in the Blair County state court the precise position presently advanced by the Equal Employment Opportunity Commission—that is, that the ADEA pre-empted and superseded the Civil Service Act. However, the City had no more success with that position in the state court system than the Equal Employment Opportunity Commission initially had in the district court. After having deferred to the ADEA as the supreme law of the land and having refused to follow the Civil Service Act in furloughing its eight most junior firefighters, the City was ordered to reinstate each with three months' full backpay and other employment benefits. Moreover, the City was also confronted with mandatory appellate precedents from two separate state judicial panels decided within weeks of the Blair County state court injunction order upholding the Pennsylvania Civil Service Act against ADEA supremacy attacks. *City of McKeesport v. International Association of Firefighters*, 41 Pa. Commw. 133, 399 A.2d 798 (1979) (decided March 7, 1979); *Schultz v. Piro*, 40 Pa. Commw. 395, 397 A.2d 484 (1979) (decided February 12, 1979).

In these circumstances, pursuing an appeal as the Court of Appeals suggested, 723 F.2d at 7, (Appendix 10a), would surely have been bootless; and, of course, appealing would have done nothing toward solving the financial exigencies of the City. Nor would commencement of a federal declaratory judgment action as suggested by the EEOC in the Court of Appeals have guaranteed a different result. An appeal to the Third Circuit Court of Appeals was necessary, after all, because the federal District Court, in disagreeing with the EEOC, held that the Civil Service Act did not contravene the ADEA. No authority exists in support of the proposition that federal litigation is preferred over

state court adjudications, or that appeals must vainly be exhausted to the bitter end, despite certain financial detriment and dislocations to the provision of municipal protective services.

All of this merely underscores that the City's challenged employment decisions, if not considered to have been based on non-age factors, at a minimum were predicated upon the following good faith grounds: financial and economic exigencies; the Civil Service Act; the March 16, 1979 state court injunction order; the collective bargaining agreement[4]; and recent mandatory appellate precedents. Indeed, it may fairly be said that the City's employment decision was neither volitional, nor even predicated so much on the Civil Service Act, as it was upon the compulsion of the Blair County state court injunction. It is this very lack of volition which distinguished this action from cases such as *Equal Employment Opportunity Commission v. County of Allegheny*, 705 F.2d 679 (3rd Cir. 1983). That and similar cases are authority only for the proposition that an employer's volitional selection between ostensibly inconsistent federal and state legislation "cannot justify employment discrimination". *Id.*, 705 F.2d at 682.

But that case clearly is not this case. The City did not blithely rely upon the Civil Service Act in derogation of the ADEA. In fact, it did precisely the opposite. In doing so, the City was not even afforded a Hobson's choice: *it had no choice.* It was, in essence, directed—if it was to retain its fiscal integrity—to retire the putative plaintiff class members. The state court injunction order, and not any age-based criteria, was the basis of the City's challenged

[4]Failure of the City to abide by the provisions of its collective bargaining agreement with the firefighters additionally exposed the City to liability for breach of that agreement. *Bowen v. United States Postage Service*, ____ U.S. ____, 103 S.Ct. 588 (1983).

employment decision. For these distinctive reasons, *Equal Employment Opportunity Commission v. County of Allegheny, supra*, and *Kober v. Westinghouse Electric Corporation*, 480 F.2d 240 (3rd Cir. 1973), are inapposite.

Whether the humanitarian policies of the Pennsylvania Civil Service Act or the policies underlying the ADEA are to be afforded precedence has been, and is, of no institutional significance to the City. The City has always complied with, and will continue to comply with, all legislation applicable to its employment decisions—whether originating in the United States Congress or the Pennsylvania General Assembly. Even the limited record in this action cogently demonstrates the City's valiant efforts to abide by the conflicting state and federal legislation in connection with the employment decisions from which this action arose. It would indeed be a keenly cruel irony if in these circumstances the City was branded a lawbreaker and—in a sort of civil double jeopardy—fastened with liability for having abided by the lawful injunction of a state court of competent jurisdiction.[5]

This Court recognized in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415, 95 S.Ct. 2362, 2370 (1975) that "backpay is not an automatic or mandatory remedy; . . . " Rather any such liability is only to be assessed in an equitably sensitive fashioning of relief, which would further the dual objectives of employers' compliance with the law and making whole injured discriminatees. It is manifest even from the abbreviated record supporting this Petition that the City requires no threat of retroactive liability to insure

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[5]The City had no alternative but to obey the state court injunction. Refusal to obey even an improperly issued injunction is punishable as contempt. *Maness v. Meyers*, 419 U.S. 449, 459, 95 S.Ct. 584, 591 (1975); *United States v. United Mine Workers*, 330 U.S. 258, 293, 67 S.Ct. 677, 696 (1947).

its compliance with the ADEA, for it sought more than five years ago to effect its reduction-in-force in strict accordance with federal law. Only the state court injunction order and two separate, independently-reasoned state appellate court precedents prevented its compliance. Assessing backpay liability against the City in these circumstances would not be promotive of this principal underlying purpose of insuring compliance with the ADEA, and in no manner could be considered to further the statutory objective of eliminating age discrimination. Moreover, imposition of retroactive liability would visit untimely injury upon innocent parties—the City's taxpayers. *City of Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 722-23, 98 S.Ct. 1370, 1382-83 (1978):

> Retroactive liability could be devastating for a pension fund. The harm would fall in large part upon innocent third parties. . . .
>
> Without qualifying the force of the *Albemarle* presumption in favor of retroactive relief, we conclude that it was error to grant such relief in this case. [Footnotes omitted.]

Surely there is something terribly wrong with a jurisprudential system gone amok in reproaching the City as a scofflaw and punishing its tax-paying citizens for the City's indubitable good faith obeyance of the state court injunction order and corresponding state appellate court precedents. But this is exactly what the Court of Appeals decision has wrought. And it is precisely this sort of disruptive intrusion into state's sovereign actions against which the constitution sought to guard in imposing "limits upon the power of Congress to override state sovereignty . . ." *The National League of Cities v. Usery*, 426 U.S. 833, 842, 96 S.Ct. 2465, 2470 (1976). If we are "to ensure that the unique benefits of a federal system in which the States

enjoy a 'separate and independent existence,' . . . not be lost through undue federal interference in certain core state functions," *Equal Employment Opportunity Commission v. Wyoming*, ___ U.S. ___, ___, 103 S.Ct. 1054, 1060 (1983), review by writ of certiorari to the United States Court of Appeals for the Third Circuit is essential.

Greater than one-half of the states have retirement laws which ostensibly are violative of the ADEA. *Equal Employment Opportunity Commission v. Wyoming*, ___ U.S. at ___, 103 S.Ct. at 1069 (Burger, C.J., dissenting). The issue of scrupulous good faith reliance upon such legislation—and because litigation relating to this type of litigation frequently occurs in state courts, the issue of justifiable reliance upon respectable, considered state court adjudications—poses issues of increasingly significant institutional importance beyond the interests of the litigants in this action. Settlement of these issues of potential backpay liability which were expressly left open in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415, 95 S.Ct. 2362, 2370 (1975), and *Equal Employment Opportunity Commission v. Wyoming*, ___ U.S. ___, ___ 103 S.Ct. 1054, 1060 (1983), would simultaneously promote the societal interests of clarifying employers' obligations and alleviating dissonance between federal and state legislative and judicial systems.

A decade ago this Court "granted certiorari because of an evident Circuit conflict as to the standards governing awards of backpay . . . ." *Albemarle Paper Company v. Moody, supra* 422 U.S. at 413, 95 S.Ct. at 2369 (footnotes omitted). Yet conflict still is extant among the circuits on the question of assessing backpay liability for an employer's justifiable good faith reliance upon state employment legislation. Compare, e.g., *Equal Employ-*

ment Opportunity Commission v. City of Altoona, 723 F.2d 4 (3d Cir. 1983), with *LeBeau v. Libbey-Owens-Ford Company*, ____ F.2d ____ (7th Cir. 1984), 33 FEP Cases 1700 (decided February 3, 1984) (reliance upon state protective legislation constitutes "special circumstances justifying denial of backpay award"). Granting the City's Petition will furnish an opportunity to resolve this important issue which confronts many state and local government employers.

CONCLUSION

If the City of Altoona violated the Age Discrimination in Employment Act, it did so only under compulsion of a state court injunction order which precluded it from ignoring the applicable state civil service legislation. Not until approximately five years later was the City's employment decision first held by a federal court to be violative of the Age Discrimination in Employment Act. Penalizing the City for what at worst might be characterized as the mistaken decisions of six different state trial and appellate judges would be inequitable, would not further the legislative purposes of the Age Discrimination in Employment Act, and would cause discordant tension between the federal and state court systems. The Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5805

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

vs.

CITY OF ALTOONA, PENNSYLVANIA
COMMONWEALTH OF PENNSYLVANIA

United States Equal Employment Opportuntiy Commission,
Appellant

(D. C. Civil No. 81-418)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA—Pittsburgh

Present: GIBBONS, GARTH and HIGGINBOTHAM,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania—Pittsburgh and was argued by counsel October 24, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered October 1, 1982, as made final by its order entered October 19, 1982, be, and the same is hereby reversed and the cause remanded for the entry of an appropriate judgment, in EEOC's favor, which on this record should include reinstatement and back pay, subject to mitigation, for those pension eligible firefighters who were

involuntarily retired pursuant to section II of the Pennsylvania Act. Costs taxed against appellees.

ATTEST:
/s/ SALLY MRVOS

Certified as a true copy and issued in lieu of a formal mandate on January 4, 1984.

Test:
/s/ M. ELIZABETH FERGUSON

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit.

December 13, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5805

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

v.

CITY OF ALTOONA, PENNSYLVANIA
COMMONWEALTH OF PENNSYLVANIA

United States Equal Employment
Opportunity Commission,

Appellant

(D.C. Civil No. 81-418)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

Argued: October 24, 1983

Before: GIBBONS, GARTH
and HIGGINBOTHAM, *Circuit Judges*

(Opinion Filed: December 13, 1983)

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OPINION OF THE COURT

GIBBONS, *Circuit Judge:*

The Equal Employment Opportunity Commission (EEOC) appeals from a summary judgment in favor of the City of Altoona and the Commonwealth of Pennsylvania,

in its complaint for injunctive relief prohibiting the City from violating the Age Discrimination and Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. §§ 621-634 (1976 & Supp. V 1981).[1] The complaint also seeks reinstatement and back pay for five former members of the City Fire Department. The district court granted summary judgment, first because the Age Discrimination Act could not, by virtue of the tenth amendment, apply to the City, and second, because the firemen in question were discharged for a reason other than age. We reverse and remand for the entry of an appropriate injunction and back pay award.

I.

In 1978 the City, experiencing budgetary problems, decided to reduce the size of the Fire Department by eight persons. It selected for termination the eight most recently hired firefighters. Those eight responded by an action in the Court of Common Pleas of Blair County seeking injunctive relief. They contended that the City's action violated Section 11 of the Third Class Cities Firemen's Civil Service Act, Pa. Stat. Ann. tit. 53, § 39871 (Purdon 1957), which provides:

> If for reasons of economy, or other reasons, it shall be deemed necessary by any city to reduce the number of paid members of any fire department then such city shall follow the following procedure:
>
> First. If there are any paid firemen . . . eligible for retirement under the terms of any pension fund, then such reduction in numbers shall be made by retirement on pension of all the oldest in age and service.

[1]The Commonwealth of Pennsylvania was joined as a defendant when the City pleaded that the actions of which complained were taken pursuant to § 11 of the Third Class Cities Firemen's Civil Service Act of May 31, 1933, P.L. 1108, Pa. Stat. Ann. tit. 53, § 39871 (Purdon 1957).

The City had previously established a pension plan permitting voluntary retirement at age fifty after at least twenty years of service. In response to the common pleas complaint the City pleaded that the ADEA prohibits "discharge [of] any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1)(1976). In support of that contention the City furnished the Common Pleas Court with a letter from the acting administrator of the Employment Standards Division of the United States Labor Department advising that in the Department's view section 11 of the Pennsylvania statute was preempted by the ADEA. No effort was made to join as parties to the Common Pleas Court action members of the Fire Department who were eligible for pensions.

On March 16, 1979 the Court of Common Pleas entered a final judgment holding that the discharge of the eight most recent hires violated section 11 of the Pennsylvania act, and ordering their reinstatement with back pay. Although in denying a preliminary injunction the Common Pleas Court discussed ADEA, the final judgment did not mention it. The City took no appeal. Instead, on March 21, 1979 the City Council resolved to reinstate the discharged recent hires, with back pay, and to discharge seven others in accordance with section 11. Of the seven, two were 57 years of age. Those two were recalled within four days. Five others, the oldest and most senior, ranging in age between 59 and 61 and in service between 26 and 37 years, were not recalled.

Some time after their forced retirement four of the five were invited to apply for reinstatement on January 1, 1980.[2] The reinstatement offer was conditioned, however,

[2]The fifth died in September 1979.

on successfully passing a physical examination and a stress test. Had they not been retired they would not have been required to take either test. One of the four failed the physical examination. The other three refused to submit to the examination.

A charge was filed with EEOC, and its conciliation efforts were unsuccessful. On March 18, 1981 EEOC commenced the instant action. All parties, conceding that there are not disputed issues of material fact, moved for summary judgment.

II.

The first ground relied upon by trial court in granting summary judgment for the City need not long detain us. Relying on *National League of Cities v. Usery*, 426 U.S. 833 (1976), the court held that the tenth amendment prohibited Congress from applying the ADEA to municipalities. That decision was made, however, without the benefit of the Supreme Court's subsequent opinion in *EEOC v. Wyoming*, ——— U.S. ———, 103 S.Ct. 1054 (1983), holding expressly that application of the ADEA to state and local government employers does not violate that amendment. *National League of Cities v. Usery, supra.* appears to have spent whatever energy for growth it might have had.

III.

The second ground relied upon by the trial court in denying relief is that 29 U.S.C. § 623(a)(1)(1976) was not violated, because the layoffs of the pension eligibles was not because of age, but because of pension eligibility. In support of that construction of the ADEA the court relied upon *McKeesport v. International Ass'n of Firefighters*, 41 Pa. Commw. 133, 399 A.2d 798 (1979).

In *EEOC v. County of Allegheny*, 705 F.2d 679 (3d Cir. 1983), this court rejected the contention that a Pennsylvania statute imposing a hiring ceiling of 35 years was a defense to an ADEA charge. That precedent controls. The undisputed facts are that normal retirement age for City firefighters under the City's ordinance is 65, and that the pension eligibles were singled out for involuntary retirement pursuant to section 11 solely because they were the oldest, in years and in service, in the Department. There is no way in which what section 11 requires can be termed a "differentiation [] based on reasonable factors other than age." 29 U.S.C. § 623(f)(1) (1976 & Supp. V 1981). Even among pension eligibles, layoffs are on the basis of age. Moreover, seniority is in section 11 inexorably linked with age, and cannot be viewed as a separate factor. *See Laugesen v. Anaconda Co.*, 510 F.2d 307, 313 (6th Cir. 1975) (discharge based on longest service violates ADEA); *cf. Geller v. Markham*, 635 F.2d 1027, 1032-33 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981) (refusal to hire persons with more than five years experience inevitably excludes older teachers). The construction of the ADEA in *McKeesport v. International Ass'n of Firefighters, supra*, is simply wrong. How wrong is disclosed in the Senate Report on the Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189:

> For capable older workers the retirement decision should be an individual option. Maximum freedom of choice should be given to employees in deciding when to retire, provided they are still physically and psychologically able to perform their jobs in a satisfactory manner.

S. Rep. No. 493, 95th Cong., 2d Sess. 3, *reprinted in 1978* U.S. Code Cong. & Ad. News 504, 506. The 1978 amendments to ADEA added to section 4(f)(2) a prohibition of

provisions in an employee benefit plan which "shall require or permit the involuntary retirement of any individual [age 40 to 70] because of the age of such individual." 29 U.S.C. § 623(f)(2) (Supp. V 1981). "[T]he purpose of the amendment to section 4(f)(2) is to make absolutely clear . . . that the exception [for bona fide seniority systems or employee benefit plans] does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age." H. R. Rep. No. 950, 95th Cong. 2d Sess. 8, *reprinted in* 1978 U.S. Code Cong. & Ad. News 528, 529.

The City attempts to justify the instant involuntary retirements, which plainly are on the basis of age because of pension *eligibility*. It is well settled, however, that mere eligibility for a pension is not a defense to a prima facie case of age discrimination. *EEOC v. Baltimore and Ohio R. Co.*, 632 F.2d 1107, 1111 (4th Cir. 1980), *cert. denied*, 454 U.S. 825 (1981). The City's contention that the retirements were based on economic considerations is equally meritless, for such considerations cannot be used to justify age discrimination. *Smallwood v. United Air Lines, Inc.*, 661 F.2d 303, 307 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982). Granted that economic considerations demanded some reduction in force, the plain fact is that section 11 on its face imposed the burden of that reduction on older employees in order of their age. This is not permitted by the ADEA, which completely preempts section 11.

IV.

The City makes one additional argument, not addressed by the trial court. It urges that the ADEA should not apply in this instance because it acted under compulsion of the decree of the Court of Common Pleas. We

reject that argument. Neither EEOC nor the pension eligible members of the Fire Department were parties to the Common Pleas action, and that court did not purport to adjudicate their rights. It is true that the court sub silencio rejected the City's tendered defense, under the ADEA, to the suit by the last hires. But the City did not claim to be a class representative for other employees who might be laid off if the late hires were reinstated. Moreover the City could have, but chose not to pursue appellate remedies with respect to the Common Pleas Court's rejection of its ADEA defense. It cannot now succeed in placing on the shoulders of older employees, protected by the federal law, the burden of the consequences of the City Council decision to comply with the state court decree rather than appeal.

V.

The judgment appealed from will be reversed, and the case remanded for the entry of an appropriate judgment, in EEOC's favor, which on this record should include reinstatement and back pay, subject to mitigation, for those pension eligible firefighters who were involuntarily retired pursuant to section 11 of the Pennsylvania act.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Plaintiff,
v,

CITY OF ALTOONA, PENNSYLVANIA and the COMMONWEALTH OF PENNSYLVANIA
Defendants.

Civil Action No. 81-418

JUDGMENT

AND NOW, this 28th day of September, 1982, upon consideration of cross motions for summary judgment, and of pleadings and evidence of record, and it appearing that the eight retired Altoona firemen whom plaintiff purports to represent were involuntarily retired pursuant to section 11 of the Act of May 31, 1933 P. L. 1108, 53 P. S. 39871 which provides that "If for reasons of economy . . .it shall be deemed necessary . . .to reduce the number of paid members of any fire department" the city shall "follow the following procedure . . . .If there are any paid firemen . . .eligible for retirement under the terms of any pension fund, then such reduction in numbers shall be made by retirement on pension of all the oldest in age and service" the city of Altoona having first attempted to lay off

the eight having least seniority, but having been required to reinstate them with back pay by order of the Court of Common Pleas of Blair County dated March 16, 1979; and the Court being of opinion that said court correctly concluded that said retirement did not violate the federal age discrimination act [29 U.S.C. 623(a) (1)] which makes it unlawful "for an employer . . .to discharge any individual . . .*because of such individual's age*", [italics supplied], that issue having been disposed of by the opinion of our now colleague Judge Mencer in *McKeesport v. Int. Assn. of Firefighters*, 41 Pa. Commonwealth Court 133, 135 (1979) where he pointed out "Section 11, however, does not require the layoff of an individual *because of age;* rather, it requires individuals to be laid off *because of the fact that they are eligible for pensions,* and therefore will not be without a source of income"; and the Court further being of opinion, if it were necessary to address the question, that fire protection is a traditional and essential function of the State as a State, and therefore constitutionally protected from federal intrusion by *National League of Cities* v. *Usery*, 426 U.S. 833, 845 (1976); defendant's contention that the age discrimination act was enacted under the enforcement powers granted in Section 5 of the Fourteenth Amendment being unpersuasive, admittedly unsupported by the legislative history, and also unsound because there is nothing in the Amendment possibly relating to age except the threadbare equal protection clause, which is inefficacious in that connection as shown by *Mass. Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 314-15 (1976);

It is accordingly ORDERED, ADJUDGED, DECREED AND FINALLY DETERMINED, that there being no genuine dispute of fact and the law being with defendants, that judgment be and it hereby is rendered against plaintiff and in favor of defendants.

/s/ DUMBAULD
UNITED STATES SENIOR DISTRICT JUDGE

Copies to:

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IN THE COURT OF COMMON PLEAS OF BLAIR COUNTY, PENNSYLVANIA

DAVID E. EHREDT, JAY M. HAINES, JAMES P. HARSHBARGER, KENNETH E. JAMES, GARY E. KELLER, JOHN R. PATTON, RONALD B. PARSON, KENNETH E. STEELE *Plaintiffs,* Vs. LEONARD L. BETTWY, Director of the Department of Public Safety, City of Altoona AND THE CITY OF ALTOONA *Defendants*	IN EQUITY NO. 3197 EQUITY

ROBERT B. CAMPBELL	PRESIDENT JUDGE
THOMAS G. PEOPLES, JR., ESQUIRE	ATTORNEY FOR PLAINTIFFS
N. JOHN CASANAVE, ESQUIRE	ATTORNEY FOR DEFENDANTS

MEMORANDUM OPINION AND ORDER

This equity proceeding seeks to restrain the City of Altoona from terminating the employment of eight City firemen and initially requests the Court to grant a preliminary injunction. The matter was presented to the Court on December 28, 1976, at which time arguments were heard by counsel for the respective parties. Because of the admittedly complicated legal question involved, the case was taken under advisement with the understanding that an order would be issued on December 29, 1978.

The averments of the complaint and the attached injunction affidavit establish the following factual situation, which the Court accepts for purposes of determining whether a preliminary injunction should issue. On December 27, 1978, Leonard L. Bettwy, a City Councilman and Director of the Department of Public Safety, notified the eight plaintiffs, who are the junior members in point of service in the Fire Department, that their services would be terminated effective at midnight December 30, 1978. The notification letters indicated that this action was taken because of the "extreme financial hardship placed on the City of Altoona by the recent Arbitration award," referring to the binding arbitration decision which fixes wages and other conditions of employment for City firemen during the coming year. It is not questioned that Mr. Bettwy was acting on behalf of the City in issuing these termination notices. The City has in effect a pension fund for its firemen who retire from service and there are now more than twenty-five firemen employed who are presently eligible for retirement.

The Third Class Cities Firemen's Civil Service Act adopted on May 31, 1933, (Subsection 11, 53 P.S. 39871) provides as follows:

"If for reasons of economy, or other reasons, it shall be deemed necessary by any city to reduce the number of paid members of any fire department, . . ., then such city shall follow the following procedure:"

"First. If there are any paid firemen, . . .eligible for retirement under the terms of any pension fund, then such reduction in numbers shall be made by retirement on pension of all the oldest in age and service."

"Second. If the number of paid firemen, . . .eligible for retirement under the pension fund of said city, if any, is insufficient to effect the reduction in number desired by said city, or if there is no eligible person for retirement, or if no pension fund exists in said city, then the reduction shall be effected by suspending the last man or men, including probationers, that have been appointed . . ."

It is the contention of plaintiffs that the proposed termination of employment is in direct violation of the quoted statute, which is ample basis for the Court to grant a preliminary injunction prohibiting the City from carrying out an unlawful act. Plaintiffs further argue that they will suffer great and irreparable harm from termination of their employment and that subsequent reinstatement if their position is sustained would not be adequate relief.

The Civil Service Act is indeed specific in its language, and if no other statutory provisions were involved, the claim for relief would appear evident. However, the City argues that the quoted Pennsylvania statute is superseded by the Federal Age Discrimination in Employment Act of 1967. This Act as amended in 1974 apparently covers Federal, State, and local government employment and basically protects individuals from arbitrary age discrimination where they are at least forty years of age but less than sixty-five years of age. In this connection, the Court was

furnished a copy of a letter from the acting administrator of the Employment Standards Administration of the U.S. Department of Labor dated April 2, 1975, which advises that the Federal legislation prohibits employers, including local governments, from discriminating against older workers. Specifically, the letter sets forth that it is the Department's opinion that the Pennsylvania statute violates this Federal legislation. It was also called to the attention of the Court that the Pennsylvania Human Relations Act has been interpreted as rendering the cited Civil Service provision as inoperative because it violates the Human Relations Act. Finally, the City argues that it would suffer substantial financial hardship if a preliminary injunction directed it to keep the firemen on the payroll after December 31, 1978, because of the vacation and other fringe benefits to which they would be entitled.

After much consideration, the Court has reached the conclusion that a preliminary injunction should not issue at this time. Although no judicial decisions were cited, and the Court has not been able to find any in the brief time allowed for research, there is no question that the City is faced with conflicting legislation relative to the termination of employment. On the one hand is the clear language of the Pennsylvania statute, while on the other is a threat of the violation of Federal law which may result in substantial financial penalties to the City. In these circumstances we cannot say that the City has acted arbitrarily nor that it is in fact violating the law in these discharges.

Finally, if the eventual resolution of this litigation concludes that the City improperly terminated the employment of the individuals in question, they would obviously be entitled to reinstatement with appropriate compensation for their losses. However, we do not believe it is appropriate for this Court at the present time to order

these employees continued in City service which might well have the effect of forcing the City to terminate senior employees and thus violate a Federal statute or perhaps even the Human Relations Act of this Commonwealth.

In reaching this decision, we are mindful of the difficult position both plaintiffs and defendants are placed in but feel that the matter can best be settled by a full hearing on the merits rather than by issuing a preliminary injunction.

For the reasons set forth above, the following order is entered:

ORDER

NOW, this 29th day of December, 1978, the request for a preliminary injunction by the plaintiffs restraining the City of Altoona from terminating their employment is denied and dismissed. The case shall proceed to hearing upon the filing of an answer by the defendants.

BY THE COURT,

ROBERT B. CAMPBELL
P.J.

IN THE COURT OF COMMON PLEAS OF BLAIR COUNTY, PENNSYLVANIA

DAVID E. EHREDT, JAY M. HAINES, JAMES P. HARSHBARGER, KENNETH E. JAMES, GARY E. KELLER, JOHN R. PATTON, RONALD B. PARSON, KENNETH E. STEELE *Plaintiffs,* **Vs. LEONARD L. BETTWY, Director of the Department of Public Safety, City of Altoona AND THE CITY OF ALTOONA** *Defendants*	**IN EQUITY** **NO. 3197 EQUITY**

ROBERT B. CAMPBELL	PRESIDENT JUDGE
THOMAS G. PEOPLES, JR., ESQUIRE	ATTORNEY FOR PLAINTIFFS
N. JOHN CASANAVE, ESQUIRE	ATTORNEY FOR DEFENDANTS

ORDER

NOW, March 16, 1979, after a review of the amended complaint filed in this matter, which is identical with the original complaint except for the addition of a Notice to Plead, and the Answer to the complaint, and after counsel for the respective parties have stipulated at argument that the pleadings are complete and contain all factual averments necessary for a final resolution of this matter, and have further stipulated that it is their desire that the decree entered by the Court on this date be treated as a final decree in order that either party may appeal therefrom, the Court enters the following Order:

(1)

The termination of the employment of the plaintiffs as of December 30, 1978 is hereby declared to have been improper and in violation of the provisions of the Third Class Cities Firemen's Civil Service Act of 1933, May 31, P.L. 1108 Subsection 11 (53 P.S. 39871);

(2)

The defendants are ordered and directed to reinstate as of March 19, 1979, any and all of the plaintiffs who have not heretofore been reinstated by the City of Altoona to the positions which they held as firefighters with the Bureau of Fire of the City of Altoona immediately prior to the termination of their employment on December 30, 1978.

(3)

The defendant City of Altoona shall pay to the plaintiffs individually such respective amounts as shall be required to compensate them for lost wages and employee fringe benefits as a result of the termination of their employment effective December 30, 1978. Said restoration

to employment and payment of back compensation shall be done in such manner as will insure that the respective plaintiffs shall be in precisely the same position for all purposes connected with their employment by the City of Altoona as if said employment had in fact not been terminated as of December 30, 1978. In the event of any disagreement between the parties as to the amount of compensation or any other benefits to which any of the plaintiffs may be due, the Court will reserve jurisdiction in order to meet with counsel and if necessary for a proper resolution of such matters; and

(4)

This decree is entered as a final decree with the specific understanding of the Court and both parties that an appeal may be filed therefrom.

BY THE COURT,

ROBERT B. CAMPBELL
P.J.

Office - Supreme Court, U.S.
FILED
MAY 16 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1490

In the Supreme Court of the United States

CITY OF ALTOONA, PENNSYLVANIA,

Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

SUPPLEMENTAL PETITION OF THE CITY OF ALTOONA, PENNSYLVANIA FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Attorneys for Petitioner City of Altoona, Pennsylvania

SUPPLEMENTAL PETITION OF THE CITY OF ALTOONA, PENNSYLVANIA FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

With this Supplemental Petition for Certiorari Petitioner seeks to apprise the Supreme Court of the recent decision of the Fourth Circuit Court of Appeals in *Johnson v. Mayor and City Council of Baltimore*, ____ F.2d ____ (No. 81-1965, April 4, 1984).

The issue in *Johnson* was whether the city pension program could permissibly require firefighters, in face of the Age Discrimination Act of 1967, 29 U.S.C. §623(a), to retire before age 70. The Fourth Circuit found in 5 U.S.C. §8335(b)(providing generally for mandatory retirement of Federal firefighters and law enforcement officers at age 55) the "reasonable Federal standard" required by *Equal Employment Opportunity Commission v. Wyoming*, ____ U.S. ____, ____ ,103 S.Ct. 1054, 1058 (1983) as would justify mandatory retirement before age 70. The Fourth Circuit Court of Appeals held *as a matter of law* that retirement of city firefighters at age 55 was based upon a bona fide occupational qualification.

The issue of age as a bona fide occupational qualification was expressly preserved by Petitioner City of Altoona in the District Court proceedings, and was unnecessary for the District Court to consider in ruling upon the Parties' respective Motions for Summary Judgment.[1] The Third Circuit Court of Appeals in this proceeding nevertheless

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[1]Brief of Defendant City of Altoona in Support of Its Motion for Summary Judgment 5: "(The City also contends in defense of these claims that insofar as age may be determined to have been a factor in its employment decision, age was a bona fide occupational qualification. Because the issues briefed are considered to be dispositive of claims asserted against the City, and because of the differing proofs required in the bona fide occupational qualification defense, this issue has not been treated in this brief, and will, if necessary, be deferred until a later stage in these proceedings.)"

remanded the matter to the United States District Court for the Western District of Pennsylvania with an instruction to enter judgment in favor of Respondent Equal Employment Opportunity Commission and against Petitioner City of Altoona; therefore, the City of Altoona may be precluded from raising the bona fide occupational qualification defense as decided by the Fourth Circuit in *Johnson.*

The decisions of the Third and Fourth Circuit Courts of Appeal are in diametrical conflict. Moreover, the cities of Altoona, Pennsylvania and Baltimore, Maryland, along with their firefighter employees, are subject to disparate employment standards.

CONCLUSION

The recent conflicting decision of the Fourth Circuit Court of Appeals emphatically illustrates the need for the Supreme Court's resolution of the intensified conflict among the Circuits through granting of the Petition for Certiorari.

Respectfully submitted,

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Attorneys for City of Altoona, Pennsylvania

DATED: May 14, 1984

Office - Supreme Court, U.S.
FILED
MAY 1 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1490

In the Supreme Court of the United States

OCTOBER TERM, 1983

CITY OF ALTOONA, PENNSYLVANIA, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
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(202) 633-2217

DAVID L. SLATE
General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20507

QUESTION PRESENTED

Whether the court of appeals properly directed the award of backpay to employees who were involuntarily retired in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1490

CITY OF ALTOONA, PENNSYLVANIA, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-10a) is reported at 723 F.2d 4.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 1983 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on March 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 7 of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 626, provides in pertinent part:

> (b) The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections [11(b), 16] (except for subsection

(a) thereof), and [17 of the Fair Labor Standards Act of 1938, 29 U.S.C. 211(b), 216 and 217], and subsection (c) of this section. Any act prohibited under section [4] of this Act shall be deemed to be a prohibited act under section [15 of the Fair Labor Standards Act of 1938, 29 U.S.C. 215]. Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections [16 and 17 of the Fair Labor Standards Act of 1938, 29 U.S.C. 216 and 217]: *Provided,* That liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

* * * * *

(c)(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: *Provided,* That the right of any person to bring such action shall terminate upon the commencement of an action by the [Secretary] to enforce the right of such employee under this Act.

Sections 16(b) (c) and 17 of the Fair Labor Standards Act of 1938, 29 U.S.C. 216(b), (c) and 217 provide in pertinent part:

(b) Any employer who violates the provisions of section [6] or section [7] of this Act [29 U.S.C. 206, 207] shall be liable to the employee or employees affected in

the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. * * * An action to recover [this] liability * * * may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. * * * The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. * * *

(c) * * * The Secretary may bring an action in any court of competent jurisdiction to recover the amount of the unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections [6] and [7] of this Act or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected * * *.

* * * * *

> The district courts * * * shall have jurisdiction, for cause shown, to restrain violations of section [15] of this Act, including in the case of violations of section [15(a)(2)] of this Act the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act * * *.

STATEMENT

By this petition, the City of Altoona seeks to avoid paying backpay to five firemen whom it discriminatorily discharged and forced into early retirement in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621, 634. It does not contest the conclusion of the court of appeals that the terminations violated the ADEA.

1. This action was brought by the Equal Employment Opportunity Commission (EEOC) pursuant to Sections 16(c) and 17 of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 216(c) and 217, alleging that petitioner's terminations of five firemen, aged 59 to 61, violated the ADEA. The suit grew out of a charge of discrimination filed by Edward Shaffer, a 60 year-old fireman with 37 years' service, who alleged that, on March 23, 1979, he had been discharged because of his age during a reduction-in-force of petitioner's fire department.[1]

In the courts below, the city defended its action by alleging that the terminations were made pursuant to a state statute providing that when a city makes personnel reductions it must first discharge the oldest and most senior of those eligible for pension benefits. Section 11 of the Third

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[1]It is undisputed that the normal retirement age for City of Altoona firefighters is age 65. There is no contention that age 65 or younger is a bona fide occupational qualification under Section 4(f)(1) of the ADEA, 29 U.S.C. 623(f)(1).

Class Cities Firemen's Civil Service Act of 1933, Pa. Stat. Ann. tit. 53, § 39871 (Purdon 1957) (hereinafter Section 11).[2]

The city also alleged that it acted under compulsion of an injunction from the Blair County Court of Common Pleas (Pet. App. 19a-21a). That state court action was filed in 1978, after the city decided to terminate its eight least senior fire-fighters as a means of reducing its budgetary problems. Those men sought a preliminary injunction in the Blair County Court of Common Pleas on the ground that their terminations would contravene Section 11 of the State Civil Service Act. The city, in defense, asserted that Section 11 conflicted with the ADEA and submitted a letter from the United States Department of Labor[3] asserting that the ADEA preempted Section 11. The city made no effort to join as parties those men who would be terminated if Section 11 were followed, or to have the case removed to federal district court. Nor did it seek the intervention of the United States or at any time file a declaratory judgment action.

The common pleas court denied the younger men's request for preliminary injunction, reasoning that an order to continue the employment of the younger men could have the effect of causing the city to terminate the older men and thus violate the ADEA statute and the Pennsylvania

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[2]Under city ordinance 4085 (Aug. 18, 1970), passed pursuant to the state's pension eligibility statute (Pa. Stat. Ann. tit. 53, § 39321 (Purdon 1957)), a fireman must be at least 50 years of age and have a minimum of twenty years' service to be eligible for pension benefits.

[3]ADEA enforcement authority was vested in the Department of Labor until July 1, 1979, when Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978), transferred that authority to the Equal Employment Opportunity Commission.

Human Relations Act (Pet. App. 15a-18a).[4] After the terminations were effected, however, the court on March 16, 1979, issued a final order requiring the reinstatement of the younger men with backpay. It held that their terminations violated Section 11, but made no reference to the impact of the ADEA on that statute. Pet. App. 19a-21a. Although the court expressly noted that all parties understood that the order was a final decree from which an appeal could be taken, petitioner decided not to appeal and seek an interim stay.[5] Instead, five days later, the City Council resolved to reinstate the younger men with backpay and to terminate the seven oldest and most senior firefighters.[6]

2. The charge giving rise to this ADEA action was filed on July 18, 1979, less than four months after the older men were terminated (C.A. App. 11). This action was filed by the EEOC on March 18, 1981. On cross-motions for summary judgment, the district court entered judgment for petitioner, finding no violation of the ADEA. The court relied on a decision of the Pennsylvania intermediate court of appeals (*City of McKeesport* v. *International Ass'n of Firefighters,* 41 Pa. Commw. 133, 399 A.2d 798 (1979)) holding that Section 11 did not require the lay-off of individuals because of age but rather "because of the fact that

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[4]The court noted that the Pennsylvania Human Rights Commission had indicated that Section 11 was inoperative because it violated the Pennsylvania Human Relations Act (Pet. App. 17a).

[5]Although two intermediate appellate courts had ruled the month before that Section 11 did not conflict with the ADEA, *Schultz* v. *Piro,* 40 Pa. Commw. 395, 397 A.2d 484 (1979); *City of McKeesport* v. *International Ass'n of Firefighters,* 41 Pa. Commw. 133, 399 A.2d 798 (1979), the state supreme court had not ruled on the question.

[6]The two youngest of these men were recalled four days after their termination. One of the others has subsequently died (Pet. App. 6a & n.2).

they are eligible for pensions" (Pet. App. 12a).[7] The court of appeals reversed. It held (*id.* at 8a):

> The undisputed facts are that normal retirement age for City firefighters under the City's ordinance is 65, and that the pension eligibles were singled out for involuntary retirement pursuant to section 11 solely because they were the oldest, in years and in service, in the Department. There is no way in which what section 11 requires can be termed a "differentiation [ ] based on reasonable factors other than age." 29 U.S.C. § 623(f)(1) (1976 & Supp. V 1981). Even among pension eligibles, layoffs are on the basis of age. Moreover, seniority is in section 11 inexorably linked with age, and cannot be viewed as a separate factor.

The court held that the older men should be reinstated with backpay (subject to mitigation), stating (Pet. App. 10a) that petitioner "cannot now succeed in placing on the shoulders of older employees, protected by federal law, the burden of the consequences of the City Council decision to comply with the state court decree rather than appeal."

ARGUMENT

1. The court below had no discretion to deny an award of backpay to the firefighters petitioner forced to retire in violation of the ADEA. Section 7(b) of the ADEA (29 U.S.C. 626(b)) provides that "[a]mounts owing * * * as a result of a violation of [the ADEA] shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections [16] and [17] of [the FLSA]" and the rights created by the ADEA are to be "enforced in

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[7]The district court also held that the ADEA was not applicable to state and local governments (Pet. App. 12a). However, as the court of appeals noted, that determination was made "without the benefit of the Supreme Court's subsequent opinion in *EEOC* v. *Wyoming*, [No. 81-554 (Mar. 2, 1983)]" (Pet. App. 7a).

accordance with the powers, remedies, and procedures" of specified sections (including Section 16(b) and (c) of the FLSA). The FLSA in turn declares that "[a]ny employer * * * shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be * * *" (Section 16(b) of the FLSA, 29 U.S.C. 216(b)),[8] and authorizes the employees affected (Section 16(b)) or the responsible agency (Section 16(c) of the FLSA, 29 U.S.C. 216(c))[9] to sue to recover the sums due.[10]

As this Court recognized in *Lorillard* v. *Pons*, 434 U.S. 575, 583-585 (1978), this statutory scheme provides to injured employees a legal right to enforce the employer's liability for backpay.[11] Nothing in that case or in the statute suggests that this right to back pay is lost when the EEOC, rather than the individual employee, sues to enforce the statute. Instead, Section 16(c), 29 U.S.C. 216(c), authorizes

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[8]Although the FLSA also provides for the recovery of an additional equal amount as liquidated damages (29 U.S.C. 216(b)), liquidated damages are available under the ADEA only where the violation is wilfull (29 U.S.C. 626(b)). No claim for such damages is before this Court in the present posture of this case.

[9]See note 3, *supra*.

[10]The agency (29 U.S.C. 217) or the employee (29 U.S.C. 626(c)(1)) may also seek an injunction or other equitable relief to "effectuate the purposes of the [ADEA]" (29 U.S.C. 626(c)(1)).

[11]Petitioner's reliance on *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), in arguing (Pet. 12) that injured employees may be denied backpay for equitable reasons, is flatly inconsistent with this Court's analysis in *Lorillard* v. *Pons, supra*, of the difference between the ADEA and Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*), with which *Albermarle Paper* was concerned: "the ADEA incorporates the FLSA provision that employers 'shall be liable' for amounts deemed unpaid minimum wages or overtime compensation, while under Title VII, the availability of backpay is a matter of equitable discretion, see *Albermarle Paper Co.* v. *Moody*, 422 U.S., at 421" (434 U.S. at 584 (footnote omitted)).

the EEOC to sue on behalf of named employees to recover the sums due. And the fact that the private right of action provided in 29 U.S.C. 216(b) terminates upon the filing of an EEOC complaint under 29 U.S.C. 216(c) strongly suggests that Congress wished to avoid duplicative law suits, intending that the EEOC would assert the individual employees' absolute right to backpay as well as the public interest.[12] See *Marshall* v. *Brunner*, 668 F.2d 748, 752-753 (3d Cir. 1982) (reversing district court's determination that it had discretion to deny liquidated damages in FLSA suit by Secretary of Labor under 29 U.S.C. 216(c) where showing of entitlement under 29 U.S.C. 216(b) had been made).

2. Even if the law were less clear that employees who are discharged in violation of the ADEA are entitled to backpay, petitioner's fact bound claim that it was inequitable to award such relief in the particular circumstances of this case would not merit review by this Court. Contrary to petitioner's claims, the award of backpay here was entirely justified by the facts of this case in light of the purposes of the ADEA.

The broad purposes of the ADEA, like Title VII, are to make victims of discrimination whole, and to eradicate discrimination from the work place. Compare *Albermarle Paper Co.* v. *Moody*, 422 U.S. at 417-418 with 29 U.S.C. 623(a), (b). To the extent that the remedial provisions of the

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[12]Moreover, after this Court's decision in *Lorillard* v. *Pons*, *supra*, the courts have unanimously concluded that EEOC, like the private plaintiff in *Lorillard*, is entitled to a jury trial on an ADEA suit brought under Section 16(c), 29 U.S.C. 216(c), on the theory that that subsection also involves assertion of a legally enforceable right. *EEOC* v. *Brown & Root, Inc.*, 725 F.2d 348, 350 (5th Cir. 1984); *EEOC* v. *Corry Jamestown Corp.*, 719 F.2d 1219, 1223-1224 (3d Cir. 1983), and cases there cited. In contrast, Section 17, 29 U.S.C. 217, like Title VII, provides only for equitable relief; there is no right to jury trial in suits brought solely under Section 17. See *Wirtz* v. *Jones*, 340 F.2d 901, 904 (5th Cir. 1965) (FLSA).

ADEA are deemed to correspond to Title VII, backpay under the ADEA, as in Title VII, serves both purposes by redressing individual injuries and providing a motive for an employer to correct its employment practices. But for the prospect of backpay liability, employers "would have little incentive to shun practices of dubious legality." 422 U.S. at 417. Therefore, because "backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes" (422 U.S. at 421), the presumption in favor of its award can seldom be overcome. *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 711 (1978).

Nothing in this case defeats this presumption. Petitioner argues that it should escape liability because it acted in good faith (Pet. 11).[13] "This would read the 'make whole' purpose right out of [the ADEA], for a worker's injury is no less real simply because his employer did not inflict it in 'bad faith.' " *Albermarle Paper Co.* v. *Moody*, 422 U.S. at 422 (footnote omitted). On the other hand, holding "a muncipality * * * liable for all of its injurious conduct, whether committed in good faith or not," has the salutary effect of creating "an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' [statutory] rights". *Owen* v. *City of*

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[13]Petitioner similarly seeks to characterize its actions under Section 11 as benign, because "[w]hile discharge without compensation is obviously undesirable, retirement on an adequate pension is generally regarded with favor" (Pet. 9, quoting *Zinger* v. *Blanchette*, 549 F.2d 901, 905 (3d Cir. 1977)). After extensive hearings, Congress concluded that forcible retirement of older employees is *not* benign. It accordingly amended the ADEA in 1978 to prohibit involuntary retirement because of age and to clarify that the purpose of the Act was to ensure continued employment for older workers capable of performing their jobs, not to provide income security through pension benefits. 29 U.S.C. 623(f)(2). In doing so, it explicitly repudiated *Zinger* (see S. Rep. 95-493, 95th Cong., 1st Sess. 10 (1977)).

Independence, 445 U.S. 622, 651-652 (1980) (footnote omitted).[14] To deny backpay for the reasons advanced by petitioner would, therefore, frustrate the ADEA's dual purposes of redressing and preventing discrimination on the basis of age.[15]

The award of backpay is entirely justified by the facts of this case. Well before 1979, petitioner was notified by the agency responsible for enforcing and interpreting the ADEA that Section 11 of Pennsylvania's Civil Service Act was in conflict with the provisions of the federal law. This awareness of the definitive administrative determination of

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[14]Petitioner's invocation (Pet. 13) of *City of Los Angeles Department of Water & Power* v. *Manhart*, *supra*, for the proposition that backpay should be denied because municipal employers pass their losses to innocent taxpayers is similarly unavailing. In *Manhart*, retroactive liability was withheld because the relevant federal agencies had issued conflicting guidelines as to whether the city's pension practices violated federal law, and because retroactive liability would be "devastating" to pension funds and thus visit significant harm on innocent third parties who relied on those funds for retirement income. 435 U.S. at 720, 722-723; *Gurmankin* v. *Costanzo*, 626 F.2d 1115, 1124 (3d Cir. 1980). Here the city had an explicit directive from the Department of Labor advising it that the state law conflicted with the ADEA and its backpay liability to five individuals is an insignificant part of the city's total budget. Moreover, even if the ADEA rights of these five claimants had been less clear, "it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated." *Owen* v. *City of Independence*, 445 U.S. at 655. In short, the added expense to taxpayers is not reason enough to avoid backpay liability. *Carpenter* v. *Stephen F. Austin State University*, 706 F.2d 608 (5th Cir. 1983); *Liberles* v. *County of Cook*, 709 F.2d 1122, 1136 (7th Cir. 1983).

[15]For the first time in this litigation, petitioner also contends (Pet. 11 n.4) that discharging last hired firefighters would have exposed it to liability under its collective bargaining agreement. A collective bargaining agreement — a species of contract — cannot override the obligation not to discriminate imposed by federal statute. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974).

the invalidity of Section 11, standing alone, is sufficient to support the backpay award. *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 254 n.127 (5th Cir. 1974). Here, petitioner was additionally aware by 1979 (when the firemen were discharged) that the Pennsylvania Human Rights Commission had concluded that Section 11 was inoperative because it violated the State's Human Rights Act (Pet. App. 17a).

Nevertheless, when faced with a state court action challenging its decision to deviate from Section 11 by discharging its least senior firefighters, petitioner did nothing whatsoever to obtain an adjudication that would bind all interested parties and resolve its conflicting obligations under federal and state law.[16] Instead, petitioner assumed the risk—by choosing to defend that action alone—that it would be bound by a judgment upholding Section 11, and at the same time would remain vulnerable to an ADEA action by the federal government or its pension-entitled firefighters if it chose to proceed with a reduction-in-force under the terms of the state law.[17]

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[16]For example, had petitioner sought a declaratory judgment in state court, the court would have ordered joinder of all the potentially interested firemen. *County of Allegheny* v. *Commonwealth*, 71 Pa. Commw. 32, 453 A.2d 1085 (1983). Petitioner could also have petitioned to remove the state action to federal district court (see 28 U.S.C. 1441 and 1443) and sought to join pertinent state and federal officials as third-party defendants. Fed. R. Civ. P. 20(a); 5 U.S.C. 702; 28 U.S.C. 2201; Fed. R. Civ. P. 57. See, *e.g.*, *Rath Packing Co.* v. *Becker*, 530 F.2d 1295, 1305-1308 (9th Cir. 1975), aff'd, 430 U.S. 519 (1977).

[17]Unable to justify its own failure to protect its interests, petitioner instead suggests that those firefighters susceptible to discharge under the terms of the state statute should have intervened in the state court action (Pet. 5 n.1). Nothing in the record indicates that the pension-entitled firefighters were even aware of the state court action, much less that they should have realized the need to intervene to protect their interests.

Similarly, after entry of the state court's order directing reinstatement of the younger firefighters with backpay, petitioner declined to pursue any course of action likely to forestall the imposition of ADEA liability. As the court below noted (Pet. App. 10a), it chose not to appeal the trial court's order to the Pennsylvania Supreme Court, which had not yet resolved the conflict between Section 11 and the ADEA (note 5, *supra*). Instead, within a week of the state court order, petitioner involuntarily retired the senior firefighters despite its clear understanding that its action was unlawful in the eyes of the federal government.[18] Predictably, one of those employees promptly filed a charge with the EEOC, to which ADEA enforcement had by then been transferred. This suit followed.

Under these circumstances, the judgment below was hardly inequitable. Cf. *W. R. Grace & Co.* v. *Local 759*, No. 81-1314 (May 31, 1983), slip op. 9-10 (employer must bear the cost of its tactical decision to lay off employees according to the terms of a district court order when it was aware that the correctness of the court's decision was unsettled). Rather, to deny backpay would unjustly place the burden of

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[18]Petitioner's repeated assertion that it had "no choice" but to discharge the pension-entitled firefighters (Pet. 10, 11, 12) is specious. The city would not have been in contempt of the state court order had it continued to employ them (Pet. 12 n.5), for that order simply directed it to reinstate the younger firefighters with backpay. Nor would its "fiscal integrity" necessarily have been compromised by retaining these five individuals (Pet. 11); petitioner was free to economize in any manner consistent with the mandate of the ADEA. See *EEOC* v. *Wyoming*, No. 81-554 (Mar. 2, 1983), slip op. 12 (the ADEA requires a state to achieve its goals in a manner consistent with the Act, "but it does not require the State to abandon those goals"). Indeed, petitioner's claim that the imposition of backpay liability against it creates "dissonance" between state and federal law (Pet. 13-14) is nothing more than an attempt to reargue *EEOC* v. *Wyoming*, *supra*.

petitioner's tactical errors on the innocent victims of its discrimination, in violation of the remedial purpose of the ADEA.[19]

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[19]Contrary to petitioner's claim (Pet. 14-15), the judgment below does not conflict with *Le Beau* v. *Libby-Owens-Ford Co.*, 727 F.2d 141 (7th Cir. 1984). In determining whether it was equitable to award backpay against employers found liable for violating federal law, the two courts merely reached different conclusions on markedly different facts.

At issue in *Le Beau* was whether backpay should be awarded under Title VII to women who had been restricted to certain jobs because a state protective law limited the amount of overtime that female employees could work. Denial of backpay was upheld principally on the ground that the employer had established a "good faith reliance defense" under 42 U.S.C. 2000e-12(b), by showing that it had relied on EEOC guidelines stating that such protective laws were consistent with Title VII. 727 F.2d at 148-149. The court also upheld the district court's conclusion that the award of backpay under Title VII would be inequitable because the employer was "on the horns of a dilemma" in light of the state statute, because EEOC's guidelines allegedly sanctioned the statute, and because the individual plaintiffs had not complained of the discriminatory practices either to the employer or the EEOC until after the employer had voluntarily eliminated these practices. 727 F.2d at 147-150. Not one of these mitigating circumstances is present here. Moreover, through the prompt filing of an EEOC charge by one of the claimants here, petitioner was afforded the opportunity—unlike Libby-Owens—voluntarily to bring itself into prompt compliance with the ADEA and thus to avoid the accrual of backpay liability. See ADEA Section 7(b), 29 U.S.C. 626(b).

In any event, there is no conflict in decisions because, as we have shown (pages 7-9, *supra*), under the ADEA, unlike Title VII, there is a legally enforceable right to backpay which the courts are without equitable discretion to deny.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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